SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 384

PEOPLE OF THE STATE OF NEW YORK, EX REL.,
ROSE HALVEY,

Petitioner,

vs.

JOHN F. HALVEY, CUSTODIAN OF JOHN ARTHUR HALVEY

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION

ROBERT S. FLORENCE,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Rose Halvey respectfully petitions for a Writ of Certiorari to the Court of Appeals of the State of New York to review an order of affirmance entered on May 10, 1946 (R. 67) affirming an order of affirmance by the Appellate Division of the Supreme Court in and for the First Judicial Department in the County of New York on the 14th day of December, 1945 (R. 62), which order of affirmance affirmed an order of the Supreme Court, New

York County, entered on the 19th day of June, 1945 (R. 3) based upon a written opinion filed in the cause and reported in 185 N. Y. Misc. Rep. 52.

Statement of the Matters Involved

Petitioner Rose Halvey, a resident of Miami, Florida since April 13, 1944, married John F. Halvey, Respondent, a resident of New York City, on April 10, 1937, in New York; they resided in New York City. A son, John Arthur Halvey, was born to the parties on February 4, 1938. The child and his parents resided in New York City until April 12, 1944, when petitioner left her husband, taking her son with her to Miami, Florida. About one year after establishing legal residence for herself and son in Florida, petitioner obtained a final decree of divorce from the respondent in the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, on April 20, 1945. Service upon respondent in the divorce action was by publication. He did not appear or contest the cause. The decree awarded the care, custody and control of the child to petitioner (R. 53).

On April 19, 1945, one day prior to the entry of the decree, while the child was attending school, the respondent, without the knowledge, consent or permission of petitioner, took possession of the child in Miami, Florida, and returned with him to New York City; subsequently refusing to return the child to petitioner, who promptly came to New York City, and on May 1, 1945, instituted *habeas corpus* proceedings in the Supreme Court of New York County to compel return of the child to her (R. 5). Written response to the writ was made, alleging that the separation of the petitioner from the respondent was without cause or justification, and that petitioner was not a fit person to have custody of the child (R. 9).

The only witnesses examined before Mr. Justice Benvenga in the New York Special Term of the Supreme Court of New York County were the mother and father of the child, and the testimony adduced consisted chiefly of charges and countercharges, which each in turn denied. The child was privately interviewed by the Presiding Justice. The final decree of divorce exemplified in the matter prescribed by Congress (R. S. 905, 28 U. S. C., Sec. 687), was introduced in evidence (R. 53).

In a written opinion the Presiding Justice stated:

> "* * * It is not disputed that when the action was started petitioner and her son were residents of Florida. Since no evidence was adduced to show that the petitioner was not a bona fide resident, the Florida decree, in so far as its divorce provisions are concerned, is entitled to full faith and credit. * * * In view of the growing liberality with respect to acquisition of a separate domicile by married women and the equally growing liberality in permitting the mother to control the domicile of her children (see Stumberg, Conflict of Laws, p. 43, note 95), it will be assumed that the custody provisions of the decree are entitled to full faith and credit. But even if it be assumed that they are not, the better interests of the child would seem to require that the petitioner should have his custody, for a child of tender years is entitled to such care, love and discipline as only a good and devoted mother can usually give (Ullman v. Ullman, 151 App. Div., 419, 424-425)."

The opinion then discusses the right of visitation of the respondent, reciting that the petitioner apparently intends to make Florida her home, while the respondent's business being in New York and there being no assurance that petitioner would comply with the order granting the respondent the right of visitation, held that the petitioner would not be permitted to remove the child without posting a

bond for the faithful performance of the order for return of the child. Thereafter, on June 18, 1945, the order appealed from was entered (R. 3). It ordered and decreed as follows:

(1) That the custody of the infant child (John Arthur Halvey) remain with the mother, Rose Halvey; and

(2) That the father, John F. Halvey, have certain rights of visitation, as follows:

(a) During each summer vacation period after the year 1945, the child shall be with the father commencing on June 23 and ending on September 7 of each year, and shall live with him during such period in his home in New York;

(b) During the entire Christmas vacation period the child will be with the father and live with him in his home in New York; and

(c) At any time, while the child lives with the mother, the father shall have the right to visit and have the child with him each afternoon from 2 o'clock until 5 o'clock.

The order then required the petitioner to file a surety bond in the sum of $5000.00 in form to be approved by the Court, conditioned for her faithful performance of the terms and conditions of this order and for the delivery of the child at her home in Florida to the father for removal to New York whenever, under the terms of the order, the father should have the right to have said child with him.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended; 28 U. S. C., Sec. 344(b). The order of the Court of Appeals of the State

of New York was entered on May 10, 1946. The time within which the petitioner may make application for a Writ of Certiorari was enlarged and extended until August 11, 1946 by order of Mr. Justice Stanley Reed entered July 8, 1946, the Court not being in session.

Constitutional Provision Involved

The constitutional provision involved is Article 4, Section 1, of the Constitution of the United States of America, giving Full Faith and Credit in each State to the public Acts, Records, and Judicial Proceedings of every other State.

Question Presented

Whether a decree of the Circuit Court of Dade County, Florida, which awarded sole custody of the child to the petitioner is given the full faith and credit to which it is entitled under the Federal Constitution, when, there being no change in circumstances since the entry of the Florida decree, a New York decree changes and alters a Florida decree by directing that the child "shall live" with the respondent for substantial periods in each year, and requires the posting of a surety bond to require petitioner to comply with the New York decree.

Reasons Relied On for the Allowance of the Writ

1. The decision appealed from is in conflict with the decision of this Court in *Davis* v. *Davis*, 305 U. S. 32; 83 L. Ed. 26, wherein at page 40 this Court stated:

> "Thus the Congress rightly interpreted the clause to mean not some but full credit."

And further conflicts with the decisions of this Court in *Williams* v. *North Carolina*, 317 U. S. 287, 87 L. Ed. 279; 325 U. S. 226, 89 L. Ed. 1577.

2. The action in this cause was arbitrary and capricious and should be reviewed by this Court.

3. The order appealed from is repugnant to the constitutional guaranty of full faith and credit when it appears that the custody of the child was changed simply because a New York Court disagreed with the decision of a Florida Court.

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued under the Seal of this Court, directed to the Court of Appeals of the State of New York, to the end that this cause may be reviewed and determined by this Court; that the order of the said Court be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

ROBERT S. FLORENCE,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Preliminary Statement

Statement of the matter involved, jurisdiction and the question presented appear in the Petition for a Writ of Certiorari herein and, in the interest of brevity, are incorporated here by reference.

II

Summary of Argument

Point 1. The decision challenges the ruling of this Court in *Davis* v. *Davis*, 305 U. S. 32, 83 L. Ed. 26; *Williams* v. *North Carolina*, 317 U. S. 287, 87 L. Ed. 279; 325 U. S.

226, 89 L. Ed. 1577; and extends some, but not full, credit to the Florida decree.

Point 2. The decision is arbitrary and capricious and in violation of the decisions of this Court, and without consideration of the fundamental requirements the New York Court destroyed the custody provisions of the Florida decree simply because the New York Court disagreed partly with the Florida decree.

Argument

The decree of the Florida Court awarding custody of the child to the mother is entitled to full faith and credit, and the alteration of the custody provisions of the decree was in direct conflict with *Davis* v. *Davis*, *supra*, when the Court admitted the Florida decree was entitled to full faith and credit, had not been impeached and without more gave some, but not full, credit to the Florida decree.

This Court held in *Williams* v. *North Carolina*, *supra*, that full faith and credit must be given by the North Carolina Courts to a decree of divorce granted by a Nevada Court where a bona fide domicile had been established in Nevada. This Court held that it is the final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause of the Constitution of the United States.

In the last appearance of the *Williams* case (325 U. S. 226), this Court said:

> "The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage contract wheresoever contracted."

Also, in the same case:

> "In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional fact

upon which it is founded, and domicil is a jurisdictional fact (p. 232)."

The New York decree recognizes and admits domicil and jurisdiction of the Florida Court.

Again, in the *Williams* case, *supra:*

> "The challenged judgment must, however, satisfy our scrutiny that the reciprocal duty of respect owed by the States to one another's adjudications has been fairly discharged, and has not been evaded under the guise of finding an absence of domicil and therefore a want of power in the court rendering the judgment (p. 233)."

There was no attempt made to impeach the jurisdiction of the Florida decree either as to subject matter or person.

It is likewise true that an award of custody, like any other decree of a competent court, is entitled to recognition and enforcement in other States (A. L. I. Restatement of the Law, Conflict of Laws, Section 147; 2 Beale Conflict of Laws, Section 147.1).

This precise question was discussed in *Ansorge* v. *Armour*, 267 N. Y. 492, in which it is held that in the absence of fraud, a Judge of the State of New York could not change the custody of the child merely because he did not agree with the action of the Nevada Court.

In the present case the Presiding Justice in his opinion also expressed this principle when he held:

> "The best interests of the child would seem to require that the petitioner should have his custody."

And very properly held that the Florida decree was entitled to full faith and credit as to the custody provisions

therein contained, but immediately thereafter he completely destroyed the custody provisions of the Florida decree by changing the terms thereof, requiring the mother, the petitioner, to post a bond to comply with the terms of the changed decree. Such a mandate could not possibly be reconciled with the provisions of the Florida decree. The Florida Court has adjudicated that the mother have the "permanent care, custody and control" of the child. The New York Court has adjudicated that she can have the custody and control for only nine months in each year in any event. The fact that the Special Term opinion, decree and order granted the father custody for only three months in each year, does not legalize the award. If the nullification of the Florida decree is valid for the three months period, it would have been equally valid had the New York order directed that the child live with the father six months or even eleven months in each year. Any alteration of the custodial period as fixed by the Florida decree must necessarily encroach upon the prerogatives of the Florida Court, and is a denial of full faith and credit to its decree.

It is admitted that there was no change of circumstances since the entry of the Florida decree to bring into this cause the *parens patriæ* doctrine. This was admitted when it held that the mother was a proper person to have the custody of the child and awarded her such custody.

The only question, as appears from the opinion of the Presiding Justice of the Special Term, was whether or not the father "is entitled to the right of visitation." The provisions of the order do not confer a "mere right of visitation" but constitute a new grant of custody. The court itself recognized the distinction and in its order granted the father a specific right of visitation in addition to that new grant of custody.

Finally full faith and credit of the Florida decree were further denied when the petitioner was required to post a bond before she could enjoy the rights granted to her under the decree of the New York Court.

At no time has it been claimed that there has been any change of circumstances since the entry of the Florida decree, nor is there anything in the record which would support such a contention. It is not disputed that at the time of the entry of its decree, the Florida Court had control of the custody of the child, and its decree may not be modified until some facts appear to show that circumstances and conditions have so changed that it is necessary to alter the provisions of the decree for the welfare of the child (*Young* v. *Roe*, 290 N. Y. 283; *Herzog* v. *Morgan*, 287 N. Y. 317; *Finlay* v. *Finlay*, 240 N. Y. 492).

There having been no change of circumstances, a modification of the Florida decree herein complained of constitutes a denial of full faith and credit to its provisions for custody of the child, and is in violation of Article IV, section 1 of the Federal Constitution.

If the respondent wished to obtain a modification of the Florida decree, he could have at any time, and can now present a suitable application to that Court, which still retains jurisdiction of the subject matter. The willful and unlawful removal of the child from the jurisdiction of the Florida Court cannot be advanced as a change in circumstances which would warrant any modification of the Florida decree by the Courts of New York or of any other State. The respondent has gained no right by his act of removing the child from Florida for the purpose of defeating the decree duly entered in that jurisdiction. The possession of the child which he then obtained is not a custody which the Court should respect (*Pickle* v. *Pickle*,

215 App. Div. 38, 45), and such action should not have been condoned by the various Courts of the State of New York.

Conclusion

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT S. FLORENCE,
Counsel for Petitioner.

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